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IN THE

Supreme Court of the United States

October Term, 1940

No. 718

L. R. BROOKS,

Petitioner,

v.

ARCHIE J. DEWAR, ET AL.

On Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF FOR RESPONDENTS

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OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42-57) is reported in — Nev. —, 106 P. (2d) 755. The district court did not write an opinion.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on October 24, 1940 (R. 57-58). The petition for a writ of certiorari was filed on January 24, 1941, and was

granted on March 10, 1941. The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Certiorari was granted on a petition raising the following questions:

> "1. Whether under the Taylor Grazing Act the Secretary of the Interior has authority pending the collection of the data necessary for the issuance of term permits, to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.
>
> "2. Whether the United States is an indispensable party to a suit brought by stockmen in Nevada to compel the Regional Grazier to permit them to graze their livestock on the public range in that state without procuring a temporary license and without incurring liability for the fees prescribed therein.
>
> "3. Whether the Secretary of the Interior is an indispensable party to a suit brought to enjoin a subordinate from enforcing rules and regulations which the Secretary himself promulgated."

Petitioner's brief has revised the wording of these questions and has added a fourth question giving it the number "3". The additional question recited is:

> "4. Whether the state courts have jurisdiction to enjoin the actions of a federal official."

Question numbered 1, as stated by petitioner, should be revised to eliminate the word "low." This character-

ization is completely *dehors* the record and is negatived by allegations in the complaint (R. 6) which are admitted by demurrer.

Question numbered 1 should be restated more exactly as follows:

> Whether, irrespective of the provisions of Section 3 of the Taylor Grazing Act which authorize the Secretary of the Interior to issue grazing permits on payment of reasonable fees, in each case to be fixed and determined, and under express requirements and restrictions as to qualifications of permittees, preferences, tenure, renewability and recognition of existing water rights and grazing rights, he may provide, under the power contained in Section 2, for the issuance of temporary revocable licenses at a uniform fee and without compliance with the said requirements and restrictions of Section 3.

The question so restated follows the question presented to and decided by the Supreme Court of Nevada (R. 55).

Question numbered 2, as above presented by petitioner, would make it appear that the respondent sought mandamus to compel the Regional Grazier to permit their livestock to graze on the public domain without license and without payment of fees. Such is not the case. The plaintiffs prayed that petitioner be enjoined from barring their livestock from the range in default of obtaining the licenses and paying the fees required by the allegedly unauthorized regulations (R. 14).

As to question numbered 3, respondents are uncertain whether petitioner has abandoned this point unless it is

held that the suit is one against the United States (Pet. Br. 9, 24, 27, 34).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269 are printed at R. 15-23 as Exhibit A to the complaint. The pertinent provisions of the "Rules for Administration of Grazing Districts," under such act, which were approved by the Secretary of the Interior on March 2, 1936 and issued by the Director of Grazing are printed at R. 23-27 as Exhibit B to the complaint.

STATEMENT

Settlers in the arid West from the beginning of the livestock industry enjoyed what has been described by this Court as an implied license to graze their livestock on the public domain (*Buford* v. *Houtz*, 133 U. S. 320, 326). During that period, the western states in the exercise of their police power passed sundry statutes which to a large extent controlled and governed the use of the range. The approval of these statutes by state and federal courts was uniformly recited to be subject to the paramount right of control in Congress whenever exercised (*Buford* v. *Houtz, supra; Omaechevarria* v. *Idaho*, 246 U. S. 343; *Bacon* v. *Walker*, 204 U. S. 313).

Each of the respondents is a stockraiser of this class, owning or leasing agricultural property, pasture and grazing lands and having stockwatering rights on the public domain (which are vested under state law), but depending

on the public domain for his grazing requirements as it is economically impossible to own all the necessary grazing land required for livestock. The livestock business of each respondent has been built up by this practice. The respondents' base properties where they raise hay to feed their stock during winter would be without value without use of the range for summer grazing, and the range itself has no economic value unless used in connection with such base properties (R. 3, 4, 9).

In 1934 Congress passed the Taylor Grazing Act[1] designed to prevent over-grazing on the public domain, to provide for its improvement and development, and to stabilize the livestock industry dependent upon it. The pertinent sections of the Taylor Grazing Act provide that (1) the Secretary of the Interior is authorized to establish grazing districts (Sec. 1); (2) he is to regulate their occupancy and use, and to make necessary rules and regulations for such purpose (Sec. 2); and (3) he is authorized under certain conditions and with specific restrictions to issue grazing permits to qualified applicants upon payment of reasonable fees to be fixed and determined in each case (Sec. 3).

From the date of the approval of the Act in 1934, no permits under the provisions of Section 3 of the Act have been issued. On March 2, 1936 the Director of Grazing, with the approval of the Secretary of the Interior, promulgated certain regulations to the effect that, until sufficient necessary data was available, permits would not be issued, but in their place temporary licenses would be issued "under authority of Section 2" (R. 23). Such licenses recited

[1]Act of June 28, 1934, c. 865, 48 Stat. 1269, 43 U. S. C. 315 *et seq.*

on their face that they were temporary and revocable (R. 9, 23). They were to be issued upon payment of a uniform fee of five cents per head per month for horses and cattle and one cent per head per month for sheep. This fee was applicable to all lands in all grazing districts (R. 9, 25).

The petitioner herein, who was then the Acting Regional Grazier for Nevada Grazing District #1, threatened to bar the livestock of the respondents from the range in default of obtaining the temporary revocable licenses and payment of the uniform fee assessed (R. 28). The respondents promptly filed their bill in the Fourth Judicial District Court of the State of Nevada to restrain such threatened action, claiming that the temporary revocable licenses offered them were in violation of the requirements of Section 3 of the Act which govern the provisions of the issuance of grazing permits. They alleged (1) that the uniform fee had not been fixed or determined as a reasonable fee in each case, that no attempt had been made to ascertain any of the various factors determinative of the reasonableness of the fee, and that by reason of varying conditions in thirty-four grazing districts in eleven states, a uniform fee could not be a reasonable fee as to each case; (2) that the temporary licenses were not for a term of years as required by Section 3; (3) that the temporary licenses carried with them no rights of renewal as required by Section 3; (4) that they were revocable without qualification or restriction on such right of revocation; (5) that the nature of such licenses diminished and impaired their right to the use of water for stockwatering purposes and that they did not adequately safeguard their grazing privileges as required by Section 3 (R. 8-10).

Brooks demurred to the complaint, his demurrer was overruled, and upon his failure to answer further, judg-

ment was entered against him as prayed (R. 31-35). On appeal, the judgment was affirmed. The Supreme Court of Nevada held that the complaint stated a cause of action, that the suit was not one against the United States, and that the Secretary of the Interior was not an indispensable party. Its opinion is printed in the record (R. 42-57). It held, among other things, that the uniform rates assessed "do not conform to the limitations prescribed in §3" and "cannot be reconciled with the idea of 'reasonable fees in each case to be fixed or determined from time to time'" (R. 56). "* * * nothing has been presented in this case which would justify us in * * * holding that, regardless of and contrary to the provisions of §3, the fees could legally be based upon the uniform rate prescribed by the Rules of March 2, 1936, or that any part of said Rules can be held valid if inconsistent with that section or any other provisions of the Grazing Act" (R. 57).

Certiorari was granted by this Court on March 10, 1941 to review the decision of the Supreme Court of Nevada. The respondents did not oppose the issuance of the writ upon the merits, *i.e.*, the question of construction of Sections 2 and 3 of the Act.

While the suit was pending in the *nisi prius* court, it was removed to the Federal District Court. Motions to remand and to dismiss were filed by the plaintiff and defendant respectively. The suit was remanded because of the lack of the jurisdictional limitation as to the value of the matter in controversy (*Dewar* v. *Brooks*, 16 F. Supp. 636). Thereafter, the United States brought suit in the United States District Court for the District of Nevada to restrain the further prosecution of the suit in the state court on the grounds that the suit interfered with the exer-

cise by the United States of its control of the public domain, that it embarrassed the United States in the possession of its property, that it harassed Federal officers in the performance of their official duties, that the Secretary of the Interior and the United States were indispensable parties. This suit was dismissed on motion (*United States* v. *Dewar*, 18 F. Supp. 981), and the United States did not appeal.

Thereafter, the United States brought thirty-nine suits against the respondents herein in the same court for the collection of grazing fees allegedly due under the regulations above referred to. The bills were dismissed upon the ground the regulations of March 2, 1936 were void (*United States* v. *Achabal, et al.*, 34 F. Supp. 1).

It is so consistently urged by the petitioner that this suit is against the United States and that the respondents seek free access to the public domain with their livestock and to avoid charges of trespass against them for such use of the public domain, that it is important to make clear that the prayer of the bill seeks no such relief (Pet. Br. 8, 15, 16, 17).

Respondents do not attack the constitutionality of the Taylor Grazing Act. They do not attack the delegation of power to the Secretary of the Interior as unlawful. They do not question the right of Congress to provide for the regulation, use and disposition of any part of the public domain. They do not question the right of the Secretary to promulgate all proper rules and regulations authorized by the Act. They claim no title to any part of the public domain or any right to use the same without payment of lawfully imposed fees or without complying with all lawful regulations requiring the obtaining of permits for such

purposes. They do not question the right of the Secretary or the Grazing Service to enforce by civil and criminal proceedings, or by actual impoundment of the livestock, any lawful rules and regulations that have been or may be promulgated. They do not seek free use of the range. They ask only that the regulations promulgated and the fees fixed be such as are authorized by and not contrary to the Act of Congress.

SUMMARY OF ARGUMENT

I.

The Nevada Court had jurisdiction to enter the decree and had all parties before it necessary to give complete relief.

A. The suit is not laid against the United States. Respondents do not question the complete ownership of the public domain by the United States, its right of dominion over the same, the right of Congress to make all provisions for the use, occupancy, control or disposition thereof, the validity of the Taylor Grazing Act, or the right of the Secretary of the Interior to make and enforce rules under its provisions. They assert rights not contrary to the Act but under it. They do not seek to disturb the Government's possession or use of the lands or to interfere with any governmental functions authorized by the Act. They have not sued Brooks in his official capacity. They sue to enjoin his tortious acts which, being without warrant of law, are the acts of an individual and not those of a federal officer.

An affirmance in this case will leave the respondents liable to obtain such permit and to pay such fees which may be required by lawful regulations under the act. A reversal will render them liable to the rules and regulations of March 2, 1936 found by the Supreme Court of Nevada to be unlawful. In neither event are the rights of the United States affected.

B. If the suit be not against the United States, petitioner concedes that the presence of the Secretary of the Interior is not important. However, the Secretary is not an indispensable party. (*Colorado* v. *Toll,* 268 U. S. 228). The rule as to the indispensability of the Secretary, applied in some cases,[1] has no application here. Joinder of parties is a matter of state practice and the Supreme Court of Nevada properly held that the joinder of the Secretary was not essential.

C. Should this Court consider the assignment (not raised below or in the petition for certiorari) that in no event can a state court enjoin the activities of one claiming to act as a federal officer, we submit that (1) this Court has never so held; (2) in analogous cases this Court has sustained actions in state courts against federal officers; (3) the cases relied on by petitioner the principle of which he asks be extended hereto are *sui generis* and afford no sound basis for the extension of their ruling; (4) special acts of Congress granting exclusive jurisdiction to the federal courts in certain classes of cases impliedly leave the state courts with jurisdiction in the present case; and

[1] *e. g.* suits to control the discretion of the superior officer and suits in which mandatory affirmative relief is sought.

(5) a denial of jurisdiction of the state courts in *all* injunction cases involving federal officers would have the harsh and unjust effect of depriving plaintiffs seeking to enjoin a federal officer to protect rights of less than $3,000 of any remedy in any court, which remedy is not denied to others.

II.

The regulations of March 2, 1936 are unauthorized in the respects complained of and have not been ratified by Congress.

A. Sections 2 and 3 of the Taylor Act, in light of their language and arrangement and their long legislative history, shows unmistakably a Congressional intention that any licensing system thereunder must conform with the requirements of Section 3; and *quaere* whether sole licensing power does not issue exclusively from Section 3. The Forest Reserve Act of 1897 and *United States* v. *Grimaud*, 220 U. S. 506, are of no assistance in construing the Taylor Act since the former act contained no limitations such as are in Section 3.

The rejection of a subsequent attempt to repeal a provision of Section 3 (the McCarran amendment) confirms the original legislative intent. Respondents construe the sections, in accordance with precedent of this Court, to give effect to both, whereas the Secretary of the Interior has ignored Section 3 and repealed its effect by administrative action.

Section 3 provides sufficient discretion and flexibility to meet the alleged administrative problems. Alleged requirements of expediency do not justify a violation of Congressional direction.

B. Congress has not ratified by implication the unlawful assertion of authority by any subsequent legislation. When analyzed, such legislation does not manifest an intention to ratify. When the act is unambiguous in its terms and the regulations in dispute are not of long standing and are attacked in their infancy, the principle of ratification is inapplicable. Precedent cited by petitioner is analyzed to show its inapplicability herein.

ARGUMENT

I.

THERE ARE NO JURISDICTIONAL DEFECTS NOR IS THERE A LACK OF AN INDISPENSABLE PARTY.

The Supreme Court of Nevada held correctly that this is not a suit against the United States (R. 50; *infra*, point A, p. 13) and that the Secretary of the Interior is not an indispensable party defendant (R. 50; *infra*, point B, p. 23). The *nisi prius* court in Nevada had jurisdiction to issue the injunction, (*infra*, point C, p. 31). Its jurisdiction to restrain one purporting to act as a Federal officer was not challenged in either of the state courts, and this Court will not consider an alleged jurisdictional defect of a state court not presented to or considered by the state courts or raised in the petition for certiorari (*infra*, point C1, p. 31).

A. This is not a suit against the United States.

Congress alone has power to prescribe the disposition of the public lands (Constitution, Art. IV, Sec. 3). Administrative officials have no authority to act in respect of them except as authorized by Congress. So when petitioner refers to "the Government", (Pet. Br. 14, 17, 22 *et al*) he means either Congress or an executive acting within the authority granted by Congress. *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215; *Light* v. *United States*, 220 U. S. 523; *United States* v. *George*, 228 U. S. 14, 22.

We do not dispute that the determination whether a suit is one against the United States is to be determined by the effect of the decree. What is the decree? It is that the defendant be enjoined from barring, or threatening to bar "plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 *in default of payment of the grazing fee of 5 cents per month or fraction thereof per head of cattle, and 1 cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as required by said rules of March 2, 1936*"[1] (R. 35).

What is the effect of the decree? The decree is *in personam* as to Brooks alone.[2] It does not bind his successors. It prevents Brooks from ejecting respondents from the public range for one reason only: by asserting against them provisions of regulations which respondents claim are illegal in that they contradict the direction of Congress to the Secretary of the Interior in a phase of the administration of the public lands.

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[1] The decree follows in *haec verba* the prayer for relief (R. 14). Emphasis throughout has been added by respondents except as otherwise noted.

[2] There is neither mystery nor sedulous silence as to the capacity in which Brooks is sued, and he is not sued in his official capacity (Pet. Br. 18-19). The caption of the case names him as a personal defendant without official designation, viz., "L. R. Brooks, defendant". He is so identified throughout the complaint and no relief is sought or has been secured against his office (R. 2, 14, 34, 35). The allegations describing his office, under the cloak of which he has asserted unwarranted authority (Compl. Par. 2, R. 2) relate to the circumstances out of which the dispute arose. After describing such office, the complaint alleges that the "enforcement of said rules, if accomplished, would not be the official act of the United States by its Acting Regional Grazier" (Compl. Par. 2, R. 3).

Respondents do not question Brooks' right to eject them from the range under any provisions of the Rules of March 2, 1936 other than the ones attacked herein. Thus, for example, if respondents were otherwise not entitled to a license because they were not within a qualified group, or, if, while grazing under the protection of the injunction, they should violate the Secretary's rules of the range as to conservation and orderly use, Brooks could eject them.

What will be the title of the United States upon the adjudication of this suit? It will not be affected in any manner. If the decree is affirmed, respondents will become subject to the regulations thereafter promulgated by the Secretary that are consistent with the direction of Congress. The present decree will confer no protection as to such regulations. If the decree is reversed, the adjudication, in effect, will be that respondents should have had licenses beginning in May, 1936 and hereafter must have them. In either event, respondents will graze under license of the United States and no rights hostile to the title of the United States or its right to possession will have been created except such that are created voluntarily by the United States. There is no trespass which might ripen by prescription against the title of the United States.[3] In fact, prescription cannot run against the United States.

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[3] Two Federal District Courts as well as the Supreme Court of Nevada have so held in this litigation. On removal and remand, Yankwich, J. wrote:

"* * * The plaintiffs do not question the right of the United States Government, through the Congress, to regulate the use of any part of its public domain. Nor do they question the right of the Congress to enact the Taylor Grazing act, or the delegation of power to the Secretary of the In-

United States v. *Nashville R. R. Co.*, 118 U. S. 120; *United States* v. *Insley*, 130 U. S. 263.

Nor is the implied license to graze on the range revoked[4] (*Buford* v. *Houtz*, 133 U. S. 320), until the Secretary of the Interior establishes a valid license system under the Taylor Act. In *United States* v. *Grimaud*, 220 U. S. 506, 521, it was held that the implied license as to forest lands was revoked by the passage of Forest Reserve Act *and the rules and regulations promulgated under it*, which were held valid. The Taylor Act provides that the publication by the Secretary of notice to establish a grazing district "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement." (Sec. 1,

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terior, under the act, to require the payment of a license fee. They assert a right *not contrary* to the act, but one *under* it." (*Dewar et al.* v. *Brooks*, 16 Fed. Supp. D. C. Nev. 636, 643. Emphasis by the Court.)

Thereafter when the United States sued to restrain respondents herein from prosecuting this suit in the state court on the ground, *inter alia*, that the suit was one against it, the bill of the United States was dismissed (see Pet. Br. 6). On this issue, Norcross, J. said:

> "It is further contended 'that property rights of the United States are involved, and that the United States is an indispensable party defendant in said suit.' The case at bar does not present any question of trespass or threatened unlawful trespass upon the public domain or any question of claimed right thereon in conflict with the paramount rights of the United States therein. *United States* v. *Grimaud*, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563; *United States* v. *Babcock* (D. C.) 6 F. (2d) 160; *Babcock* v. *United States* (C. C. A.) 9 F. (2d) 905." (*United States* v. *Dewar*, D. C. Nev. 18 F. Supp. 981, at 983.)

The United States did not appeal from this decision.

[4] See Pet. Br. p. 44, note 56.

R. 16). The Act does not purport to revoke by its passage the implied license; nor would it in view of the impractical consequences as to any or all lands not first constituted by the Secretary into grazing districts, or, if so constituted, several or many years would elapse before regulation was attempted.

Petitioner states that "respondents ask only one thing: free access to the public lands of the United States" (Pet. Br. 15).[5] The respondents sought no such relief. They sought to protect from destruction, by equitable relief, their business from the illegal assertion of authority by Brooks. As a basis for equitable jurisdiction, respondents describe that business (R. 3-5), the manner in which Brooks' illegal assertion of authority threatens it (R. 10) and the irreparable nature of the injury threatened (R. 11-14). The protection of that business against illegal threats is a proper subject for equitable relief.[6] *International News Service* v. *Associated Press*, 248 U. S. 215, 236; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. (2d) 308 (Ct. of App. D. C, 1938).[7]

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[5] See also Pet. Br. 8, 15, 16 and 17. It is difficult to reconcile petitioner's repeated assertion with the allegations in the petition and the record in this case. For example, the grazing fees due in May 1936 (see Complaint, Ex. D, R. 29) were deposited in Court in lieu of bond and were returned only upon entry of final decree (R. 35).

[6] In *Tennessee Valley Power Co.* v. *T. V. A.*, 306 U. S. 118, Pet. Br. p. 23, it was held that the freedom of public utilities holding non-exclusive franchises to be free from competition was not a legally protected right (at 140). Its limitation would be *damnum absque injuria.*

[7] In the *Red Canyon* case, where plaintiff's sheep business was carried on under a temporary license and would be destroyed by threatened illegal action of the Secretary in conveying the lands which were the subject of the license to another party, it was held

Nor are we seeking to "interfere with the functions of Government" (Pet. Br. 16) because the authority asserted by Brooks is not authority conferred by "the Government" which, in this case, is the Congress and the Secretary of the Interior only when acting under authority conferred.

It has been repeatedly held by this Court that when a Government official acts without authority, his act ceases to be the act of the Government; he stands stripped of governmental sanction and acts as an individual. If other conditions of equity jurisdiction are present he may be restrained as a trespasser. Such a suit is not one against the United States.[8]

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that equity had jurisdiction to protect the plaintiff's business from destruction by such illegal act; that the business of using the public domain for grazing livestock is a lawful business and that it will be protected by injunction; that if the Secretary sets up grazing districts under the Taylor Act, those who come within a preferred class "are entitled as of right to permits * * *" (at 314).

[8] It is submitted that all of petitioner's citations wherein the suit failed as one against the United States were under circumstances inapplicable herein (Pet. Br. 13-19, notes 9, 10, 13-17, 19). Several of them expressly distinguish the facts of this suit (see *infra*, p. 21). They comprise the following groups:

Suits against officers of states on defaulted bonds or other state fiscal obligations for the specific performance of the obligation, or the enforcement of a lien, or to collect special taxes designated for payment thereof: *Louisiana* v. *Jumel*, 107 U. S. 711, 720-723; *Hagood* v. *Southern*, 117 U. S. 52, 67-68; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Christian* v. *Atlantic & N. C. Railroad*, 133 U. S. 233, 241; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476; *North Carolina* v. *Temple*, 134 U. S. 22, 30; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, 232; *In re Ayers*, 123 U. S. 443, 502-506; *Smith* v. *Reeves*, 178 U. S. 436, 439;

Suits for specific performance of a contract by the government: *Wells* v. *Roper*, 246 U. S. 335, 337;

Noble v. *Union River Logging Co.*, 147 U. S. 165, 171, 172;
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 108;
Ex Parte Young, 209 U. S. 123, 155, 156, 159;
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 619;
Northern Pac. Ry. Co. v. *North Dakota*, 250 U. S. 135, 152;
Work v. *Louisiana*, 269 U. S. 250, 253-255.

Suits for the performance of a trust wherein the United States is the trustee or guardian of the property for the benefit of Indians: *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Morrison* v. *Work*, 266 U. S. 481, 485;

Suits to divest the United States of title to or possession of its property, or wherein such would be the effect of a defense asserted: *Louisiana* v. *Garfield*, 211 U. S. 70, 77-78; *Goldberg* v. *Daniels*, 231 U. S. 218, 221-222; *Carr* v. *United States*, 98 U. S. 433, 438; *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 283; *Leather* v. *White*, 296 Fed. 477, aff'd 266 U. S. 592; or to take possession of property or its proceeds lawfully in the custody of the state: *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123-124; or to prevent the United States from disposing of its title to a third party: *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69-70;

Suits to prevent the United States from using its property, which allegedly incorporates a patented device: *Belknap* v. *Schild*, 161 U. S. 10, 25; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605; *James* v. *Campbell*, 104 U. S. 356; *Hollister* v. *Benedict*, 113 U. S. 59, 67-68;

Suits to restrain an officer from acting, or to mandamus him to act, in a matter wherein he has discretion: *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324;

Negligence actions for a money judgment or a libel *in rem* to arrest a ship operated by a state officer: *Ex Parte State of New York, No. 1*, 256 U. S. 490, 501; *Ex Parte State of New York, No. 2*, 256 U. S. 503, 510-511.

In *Philadelphia Co.* v. *Stimson, supra,* the plaintiff, claiming that the Secretary of War did not have authority under statute to establish regulations in question concerning harbor lines on the Alleghany River, brought a bill to restrain the Secretary from causing threatened criminal prosecutions to be instituted against it for an alleged violation of these regulations. As to the contention that the bill was a suit against the United States, the present Chief Justice said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little* v. *Barreme,* 2 Cranch 170; *United States* v. *Lee,* 106 U. S. 196, 220, 221; *Belknap* v. *Schild,* 161 U. S. 10, 18; *Tindal* v. *Wesley,* 167 U. S. 204; *Scranton* v. *Wheeler,* 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principal has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments [citing cases]. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble* v. *Union River Logging R.R. Co.,* 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94.
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things

of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

Conversely, in several of the cases cited by petitioner[9] wherein a suit was held on the facts to be one against either a state or the United States, the decision affirmatively excepts the situation presented by the case at bar and expresses the rule stated above. Thus, in *Hagood* v. *Southern*, (117 U. S. 52) where holders of state scrip secured a mandatory injunction against state fiscal officers to compel them to accept the scrip in payment of taxes, it was held that the suit was one for specific performance of the state's obligation. This Court said:

> "A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions of law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void. Of such actions at law for redress of the wrong, it was said by Mr. Justice Miller, in Cunningham v. Macon & Brunswick Railroad Co., ubi sup.: 'In these cases he is not sued as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* author-

[9] Pet. Br. 13-19, notes 9, 10, 13-19. See also, for example, *In re Ayres*, 123 U. S. 443, 500-503; *Ex Parte State of New York No. 1*, 256 U. S. 490, 500.

> ity as such officer. To make out his defence he must show that his authority was sufficient in law to protect him (p. 452).' * * * And so the preventive remedies of equity, by injunction, may be employed in similar cases to anticipate and prevent the threatened wrong, where the injury would be irreparable, and there is no plain and adequate remedy at law, as was the case in *Allen* v. *Baltimore & Ohio Ry. Co.*, 114 U. S. 311, where many such instances are cited'' (at 70-71). (Emphasis by the Court.)

Petitioner does not appear to disagree with respondents as to the applicable law, but only as to the effect of the decree. Thus, in summarizing the cases wherein the suit was held not to be one against the United States, petitioner writes that "in a good number of cases the plaintiff has been allowed by the injunction suit against the officer to challenge the validity of regulatory statutes or regulations, in the outcome of which the Government can have no interest if the command be invalid"[10] (Pet. Br. 22).

If, by "the Government," petitioner refers to Congress, and it is held that the regulations of March 2, 1936 are invalid, Congress has no interest in the outcome of this suit other than to await administrative compliance with its direction. If, by "the Government," petitioner refers to the Secretary of the Interior, his interest in such event will be only to comply with the Congressional direction.

It is submitted that this is not a suit against the United States.

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[10] Citing *Ex Parte Young, supra;* the *American School of Magnetic Healing* v. *McAnnulty, supra; Truax* v. *Raich,* 239 U. S. 33; *Pierce* v. *Society of Sisters,* 268 U. S. 510.

B. The Secretary of the Interior is not an indispensable party defendant.

Respondent's brief tends to limit the discussion of this issue. It is clear from his brief that the petitioner does not consider the presence of the Secretary important unless it be determined by this Court that the suit is one against the United States. Petitioner says:

> "It is not so clear, if the suit is not laid against the United States, and if the respondents can obtain all they ask by restraint of the local officer, that the Secretary must be joined" (Pet. Br. 9; also *ibid*, pp. 24, 27).

The following amounts almost to an abandonment of the point that the Secretary is an indispensable party:

> "But it does not seem to us to be a matter of particular consequence, if the suit can in fact be brought against the officer rather than the government, whether the nominal defendant be the superior or the subordinate officer. Nor, in the case where the plaintiff can obtain all he seeks by compulsion of the subordinate alone, does there seem to be any compelling reason of logic or of law why the superior must necessarily be joined. In either case, the real objection is that the government itself is impleaded.
>
> "In the abstract, then, we view it as a matter of comparative indifference whether or not the respondents may proceed against the petitioner without joining the Secretary of the Interior" (Pet. Br. 34).

We do not see such identity of issue. Unless petitioner has abandoned its point as to the necessity of joining the

Secretary, it might be a possible, but, with respect, an unfortunate decision in this case that the suit is not one against the United States because the Secretary lacked authority as to the rules of March 2, 1936, but that for the determination of the question of authority, his presence is necessary. Further, for example, non-identity of issues would be apparent in a suit to clear title which Congress has authorized, which, without waiver, would be a suit against the United States, but is subsequently dismissed for failure to name or serve other necessary parties. But, whether or not the point as to indispensability is abandoned, and despite the conclusion that this is *not* a suit against the United States (*infra*, p. 13), we submit that *Colorado* v. *Toll*, 268 U. S. 228 is controlling and is correct in principle. A preliminary point must, however, be first presented.

1. ***Whether the Secretary is an indispensable party is a matter of state practice and, under the decision of this Court, the Supreme Court of Nevada has conclusively ruled thereon.***

The Supreme Court of Nevada held that it did not "find merit in appellant's second specification of error, that the district court erred in holding that the Secretary of the Interior was not an indispensable party defendant" (R. 50). The point had been raised by demurrer and determined by the state district court (R. 31, 32).

Section 8565 of the Nevada Compiled Statutes (1929) provides:

> "The court may determine any controversy between parties before it, when it can be done without

> prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *."

The decision of the Supreme Court of Nevada to which the petitioner objects was simply a decision that, as a matter of general equity jurisdiction, the presence of the Secretary of the Interior was not necessary to a complete determination of this suit. That the Supreme Court of Nevada relied on federal precedent for this issue does not establish that it was decided as a federal question (Pet. Br. 24) because there is no precedent in Nevada. Respondents' basic authority in the Nevada court was the statute quoted above. (See Resp. Br. p. 15, *Brooks* v. *Dewar*, Sup. Ct. Nev. #3287.) The decision was one of state practice and procedure, and the decision of the Supreme Court of Nevada on such a subject is conclusive.

> *Newman* v. *Gates*, 204 U. S. 89 (1907);
> *John* v. *Paullin*, 231 U. S. 583 (1913).

This Court has uniformly held that it will not review a decision of a state court upon a purely state question even though questions of federal law are also presented by the record.

> *Murdock* v. *City of Memphis*, 20 Wall. 590 (1874);
> *Sauer* v. *New York*, 206 U. S. 536 (1907);
> *Detroit & Mackinac Ry.* v. *Paper Co.*, 248 U. S. 30 (1918).

2. *The Secretary of the Interior is not an indispensable party.*

But on the assumption that the question of parties is one to be determined by this Court, and is still urged by petitioner though the action is clearly not against the United States, it is submitted that the Secretary is not an indispensable party to the determination of his statutory authority, any more than the members of Congress and the President are necessary parties to determine the constitutionality of a federal statute.

The point may, we think, be resolved through petitioner's own logic. He says:

> "Nor, in the case where the plaintiff can obtain all he seeks by compulsion of the subordinate alone, does there seem to be any compelling reason of logic or of law why the superior must necessarily be joined" (Pet. Br. 35).

Later, in discussing his difficulty in reconciling *Gnerich* v. *Rutter* with *Colorado* v. *Toll*, petitioner says:

> "The difficulty relates to the cases, such as this, where the plaintiff can obtain the relief he asks by compulsion of the subordinate alone" (Pet. Br. 31, note 36).

This then is a simple syllogism leading to the inevitable conclusion that it is not necessary to join the Secretary in this case.

Respondents appreciate the frankness and fairness with which the petitioner has discussed this point. However, all considerations of law and policy why the Secretary need not and should not be a necessary party herein have

not been set forth. They are, in summary fashion, as follows:

(1) *Colorado* v. *Toll*, 268 U. S. 228, is controlling and does not overrule *Gnerich* v. *Rutter*, 265 U. S. 388, which is inapplicable herein.[11]

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[11] In *Colorado* v. *Toll*, 268 U. S. 228, Colorado sought and secured injunctive relief against the director of the Rocky Mountain National Park to restrain the enforcement by him of regulations made by the Secretary relating to use of highways in the Park as "beyond the authority conferred by acts of Congress." It was held that the Secretary of the Interior was not a necessary party.

It is submitted that this decision is not limited to cases wherein or by the fact that the State of Colorado was plaintiff. Its presence as plaintiff, suing as *parens patriae*, related to an issue different from the question of necessary parties defendant. (See Record, *Colorado* v. *Toll*, Oct. Term 1924, Docket #234, Brief for Appellee, pp. 12-14, filed April 11, 1925, ibid.) Petitioner raises this possibility but does not urge it (Pet. Br. 30).

In *Gnerich* v. *Rutter*, 265 U. S. 388, plaintiff, a retail druggist, had been granted by the Prohibition Commissioner, as agent of the Commissioner of Internal Revenue, a license to sell a designated maximum amount of spiritous liquors. Plaintiff filed a bill against the local prohibition director that he show cause "why said purported limit so fixed in plaintiff's permit should not be by him disregarded pending the final hearing and determination of this cause, and why all lawful actions by complainant and others similarly situated to purchase alcohol and spiritous liquors *in such quantity or quantities as to them may be most advantageous to their business* as pharmacists should not be approved." (Record *Gnerich* v. *Rutter*, Oct. Term 1923, No. 79 p. 10; *Gnerich* v. *Yellowley*, 277 Fed. 632, 634, C. C. A. 9.) This Court held that the Commissioner of Internal Revenue was a necessary party and properly observed that, if the injunction were granted, "his are the hands which would be tied" (at 391).

It will be apparent that (1) the determination of the maximum amount of spiritous liquors licensed to be sold under the regulations of the Commissioner of Internal Revenue was a matter of the superior's discretion, upon application made by plaintiff; (2) plaintiff sought indirectly by restraint against the local prohibition director to nullify the discretionary limitation already fixed. These

(2) There is no logical reason for extending *Gnerich* v. *Rutter* beyond the situation where the exercise of discretion in the matter by the superior officer would be nullified by injunctive relief only against his subordinate.[12]

(3) This view avoids the necessity of holding, as has been done in some cases, (Pet. Br. p. 31, note 37) that *Colorado* v. *Toll* overrules *Gnerich* v. *Rutter*.

(4) The convenience to the Government in defending these suits in the District of Columbia is of far less weight than the fairly certain effect of virtually depriving of all remedy individuals living far distant.[15]

(5) The danger of conflicting orders bearing upon the subordinate officer (an injunction of a federal or state court on the one hand and the direction of a superior officer on the other) is more fancied than real (Cf. Pet. Br.

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points were so presented to this Court. (See Brief for Appellee, pp. 12, 17, *Gnerich* v. *Rutter*, Oct. Term 1923, No. 79.)

The National Prohibition Act provided a direct appeal to a court of equity to review the Commissioner's decision (*Gnerich* v. *Yellowly*, 632, 635). Plaintiff had not followed his proper remedy.

[12] This was the situation also in *Webster* v. *Fall*, 266 U. S. 507. The situation where the relief sought, if granted, would be ineffective because it requires an affirmative act to be done by the superior officer is governed by *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28.

[13] The Supreme Court of Nevada did not necessarily so hold (Contra, pet. Br. 31).

[15] "For the inconvenience to a plaintiff maneuvered by indispensability into litigating in Washington is obviously great" (50 Yale L. J. 916-17).

25). The superior officer will hardly be inclined to insist that his subordinate deliberately violate a court injunction while it remains in effect. Nor would he be expected to remove the subordinate merely to avoid the injunction.[16] The duties of a federal officer, as well as those of a state officer, may always involve individual liability.

(6) It is not an anomalous situation (Cf. Pet. Br. 28) particularly in a western state, far from the seat of government, to find a local enforcement officer the sole defendant when he alone sends notices signed by him to notify respondents that they will be "technically in trespass," and bringing to their attention the criminal provisions of the Taylor Grazing Act unless their grazing fees have been paid by a specified date (R. 14, 28). Impoundment of livestock is another consequence of trespass (R. 26). "The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined. Although the actors may be authorized and incited by him so that he would be a proper codefendant if he were within the court's reach, the court has the power to stop the trespassing by those within its jurisdiction, irrespective of their claim that they are acting for others." *Ryan* v. *Amazon Petroleum Corporation*, (71 Fed. (2d) 1, 4, C. C. A. 5; reversed on other grounds 293 U. S. 539; see also *Yarnell* v. *Hillsborough Packing Company*, 70 Fed. (2d) 435 (C. C. A. 5). The peti-

[16] These "arguments appear to unreality in view of the structure and habits of administrative agencies, which are hardly likely either to instruct subordinates to disregard court orders on pain of contempt, or to make changes in personnel merely to frustrate an injunction" (50 Yale L. J. 911).

tioner concedes the effectiveness of the relief sought against Brooks alone (R. 35).

(7) Except where the application of the indispensability rule seems necessary in cases where the superior should be free to use his discretion or where mandatory affirmative orders are sought against him, the indispensability rule would seem to be "a puzzling and useless hindrance to litigation."[17]

(8) Where, as in the instant case, the issue is one of statutory construction, and where, if the Secretary were a party and the action filed in Washington, the conduct of the trial and appeal would be by the representatives of the offices of the Attorney General and the Solicitor General who have appeared herein, the application of the indispensability rule would neither aid the argument or protect rights that cannot be protected herein.

(9) The "inadequacy of the attempts" to justify such application, the resultant denial to plaintiffs of a trial on the merits if applied, the availability of government attorneys in every district "point strongly to the conclusion that the superior officer should not be considered an indispensable party unless his active concurrence is required to effect the relief asked."[18]

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[17] 50 Yale L. J. 917. The reasons for the indispensability rule have also been defined as "rather tenuous justifications" and the added expense and inconvenience of bringing the action in Washington is thought often to result "in the denial of a right to trial upon the merits" (37 Columbia L. Rev. 142).

[18] 50 Harvard L. Rev. 801, 802.

C. The Nevada Court has jurisdiction to restrain petitioner.

1. ***This Court will not consider an alleged jurisdictional defect of a state court where the point was neither raised in the petition for certiorari nor presented to the court below.***

Petitioner's point that a state court lacks power to enjoin a federal officer was concededly not raised in the petition for certiorari or in the courts below (Pet. Br. 35, note 46; R. 31). This Court has repeatedly held that it will not consider questions not raised in the petition for certiorari.[1] Nor will it consider a question which petitioner failed to raise in the state court below.[2] These principles

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[1] *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Webster Electric Co.* v. *Splitdorf Elecrtical Co.*, 264 U. S. 463, 464; *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240; *Steele* v. *Drummond*, 275 U. S. 199, 203; *Olson* v. *United States*, 292 U. S. 246, 262; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Prudence Co.* v. *Fidelity & Deposit Co. of Maryland*, 297 U. S. 198, 208; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182; *Hubbard* v. *Tod*, 171 U. S. 474, 494.

[2] *Dewey* v. *Des Moines*, 173 U. S. 193, 197, 198; *Whitney* v. *People of State of California*, 274 U. S. 357, 362, 363; *People of State of New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646, 650, 651; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Detroit, Ft. W. & B. I. Ry.* v. *Osborn*, 189 U. S. 383, 390, 391; *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430 (1939), where this Court, upon certiorari to the Supreme Court of New York stated at p. 434: "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225; *Duignan* v. *United States*, 274 U. S. 195, 200."

apply even when the point raised is that the state court lacked jurisdiction. *Clark* v. *Willard*, 294 U. S. 211 (1934)[1]

The wisdom of this rule is well exemplified by the history of this case. Respondents' motion to remand[2] was presented at the same time as petitioner's motion to dismiss.[3] The petitioner had every opportunity at that time to present its novel contention that the state court in any event lacked jurisdiction to enjoin a federal officer. The same opportunity was present when the United States sued to enjoin the prosecution of this action in the state courts,[4] when petitioner appealed to the Supreme Court of Nevada,[5] and when he petitioned to this Court for certiorari.

Respondents' right to a construction of the Taylor Grazing Act should not now be defeated by such tardy suggestion, which we submit is without merit.

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[1] Wherein the point was raised initially in this Court that the jurisdiction was never present in the state court because the subject of the litigation had no situs in the State of Montana. This Court said: "The petitioner makes a point that the property or part of it subjected to the levy was not of such a nature as to have a situs in Montana or to be amenable to process issuing from her courts. No such point was made in the record of the proceedings in the court below. No such point was made in this court in the petition for certiorari to bring the case here for review. It will not be considered now. *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182; *Helvering* v. *Taylor*, 293 U. S. 507" (at 216).

[2] See *supra*, p. 7.

[3] *Dewar* v. *Brooks*, 16 F. Supp. 636, 637.

[4] *United States* v. *Dewar*, 18 F. Supp. 981.

[5] *Brooks* v. *Dewar*, — Nev. — ; 106 Pac. (2d) 755.

2. *A state court has jurisdiction to restrain petitioner's threatened tortious conduct in this case even though otherwise he be a Federal officer.*

It is elementary that although the jurisdiction of the Federal courts is derived from the Constitution the exercise of such jurisdiction is limited to the extent and purposes expressly fixed by Congress. (Art. III, Sec. 1, 2; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Kline* v. *Burke Construction Co.*, 260 U. S. 226). Petitioner does not claim that Congress has vested the district courts with exclusive jurisdiction to entertain suits against federal officers. That Congress has permitted such jurisdiction to remain in the state courts in all proper cases is strongly indicated by statutory provision permitting removal to the Federal courts of suits against certain types of Federal officers. Such a statute is the "Force Act" (Jud. Code, sec. 3; 28 U. S. C. 76) and Article 117 of the Articles of War (10 U. S. C., Sec. 1589; 41 Stat. 811). The former permits such removal in actions against officers acting under the revenue laws, officers of a Federal court and members of Congress when sued for action taken under authority of their office. The latter applies to suits against military officers of the United States. Likewise, exclusive jurisdiction is given to the Federal courts in suits to enjoin enforcement of orders of the Interstate Commerce Commission. (Jud. Code, Sec. 208; 28 U. S. C. Sec. 46).

This Court has clearly indicated that there was left to the Courts of the respective states all jurisdiction which Congress did not exclusively vest in the Federal district courts, or which was not so vested by the constitution.[1]

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[1] Inferior federal courts have impliedly recognized a state court's jurisdiction to enjoin unauthorized conduct of a federal officer by

In *Teal* v. *Felton*, 12 How. 284 (1851) a local postmaster was sued for damages for refusal to deliver mail, the postmaster withholding it for lack of sufficient postage under certain claimed regulations. In spite of a plea to the jurisdiction, judgment was rendered for the plaintiff and the case eventually reached this Court where it was again claimed that the State Court had no jurisdiction. This Court affirmed the judgment and upheld the jurisdiction of the state Court, saying:

> "If then they (the posted matter) be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court. Now the courts in New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case, we cannot express our view better then Mr. Justice Wright has done in his opinion in this case in the Court of Appeals. After citing the 2d section of

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holding that such injunction suits cannot be removed to a federal court unless a federal statute authorizes such removal. *Underwood* v. *Dismukes*, 266 Fed. 559 (D. C., R. I.) (suit to restrain naval officer from interfering with rights to remove sand); *City of Stanfield* v. *Umatilla River*, 192 Fed. 596 (C. C. D. Ore.); *Dewar* v. *Brooks*, 16 F. Supp. 636, (D. C. Nev.). And the fact alone that a defendant is a federal officer does not give the federal courts original jurisdiction over all suits against him or render suits in a state court against such officer removable to a federal court. *Ingram Day Lumber Co.* v. *U. S. Shipping Board*, 267 Fed. 283; *Ford Motor Co.* v. *Automobile Insurance Co.*, 13 F. (2d) 415; *McNally* v. *Jackson*, 7 F. (2d) 373.

> the 3d article of the Constitution, he adds, 'this is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary' " (12 How. 284, 292 [1851]).

Petitioner passes this case, as well as *Harris* v. *Dennie*, 3 Pet. 292, with the comment that the state courts doubtless have jurisdiction to entertain suits for damages against Federal officers. In principle, however, (applying petitioner's own criterion as to determining the nature of an action by the relief sought) there would seem to be an entire analogy between *Teal* v. *Felton*, *supra*, and such cases as *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902) where the postmaster was enjoined (in a Federal court) from unlawfully withholding delivery of mail under an unauthorized fraud order.

The harshest results would accompany a rule to the effect that in no event has a state court jurisdiction to entertain an injunction suit against a federal officer where equity requires that his rights be so protected. Such rule would deprive a large class of litigants of any remedy whatsoever. This class would include all persons suing to protect rights cognizable in equity when the matter in controversy is less than $3,000 in value.[1]

Again, in *Slocum* v. *Mayberry*, 2 Wheat. 1, (1817), which challenged the jurisdiction of a State court to entertain a

[1] For further discussion of this point see *infra*, p. 41.

replevin suit against a Federal surveyor of customs growing out of his alleged unlawful seizure of the cargo of a vessel, this Court said:

> "To what court can this appeal be made? The common-law courts of the United States have no jurisdiction in the case; they can afford him no relief. The party might, indeed, institute a suit for redress, in the district court, acting as an admiralty and revenue court; and such court might award restitution of the property unlawfully detained. But the act of congress neither expressly, nor by implication, forbids the state courts to take cognisance of suits instituted for property in possession of an officer of the United States, not detained under some law of the United States; consequently, their jurisdiction remains. Had this action been brought for the vessel, instead of the cargo, the case would have been essentially different. The detention would have been by virtue of an act of congress, and the jurisdiction of a state court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the state court (2 Wheat. 1, 11 [1817]).

In commenting on this case the petitioner expresses the view that the decision "seems equally applicable to a bill for an injunction" but considers that, either because it was decided before the *habeas corpus* cases or because of its antiquity, it cannot be considered controlling at this date (Pet. Br. 40, note 51). Such attempted disposition of the force of the holding is not persuasive. The *habeas corpus* cases, as hereinafter pointed out, stand on a different basis. Early cases close to the formative period de-

fining the relation of the Federal to the state governments, particularly when they remain without adverse comment to the present, are entitled to a maximum rather than a minimum value. This is so particularly where the principle of such cases has been followed subsequently.[1]

In *Northern Pacific Railway Co.* v. *North Dakota*, 250 U. S. 135, the Court, while reversing the state court on the merits, upheld its jurisdiction in an action to enjoin the Federal Director General of the Railroads from enforcing intrastate rates made by the Interstate Commerce Commission under the "Railroad Control Act" of 1918 (40 Stat. 451). It is true, as noted by petitioner (Pet. Br. 39, 40, note 51), that the act contained a section waiving immunity from suit but the decision was not based upon such provision. In fact, the opinion, while quoting other parts of such section, does not refer to the immunity clause. The Court, following the same line of reasoning in *Teal* v. *Felton, supra,* and *Slocum* v. *Mayberry, supra,* said:

> "* * * The relief afforded against the officer of the United States proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject therefore to be restrained by state power within the limits of the statute. Upon

[1] *Drury* v. *Lewis*, 200 U. S. 1 (prosecution for murder); *Buck* v. *Colbath*, 3 Wall. 334 (trespass against marshal); *Maryland* v. *Soper*, 270 U. S. 36 (perjury by prohibition officer); *Scranton* v. *Wheeler*, 179 U. S. 141 (ejectment by riparian owner); *Stanley* v. *Schwalby*, 147 U. S. 508 where, upon appeal, from an action to try title in a Texas state court, this Court held that the state court was not ousted of jurisdiction by the defendants' plea that they acted as officers of the United States.

the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted * * *" (at 151).

As a matter of logic and legal analysis there should be no doubt whatsoever as to the power of the state court herein. Where suit is brought in a State court to restrain a Federal officer from acting in respects allegedly unauthorized, the injunction would operate against him only as an individual and not as a Federal officer; otherwise the case must be dismissed as one against the United States. (*Supra*, p. 13 et seq.). The injunction if granted would not restrain Federal functions. On the filing of such suit it should not be dismissed as a suit against the United States unless the contentions concerning the want of power in the officer are so unsubstantial and frivolous as to afford no basis for jurisdiction and hence to cause the suit to be from the beginning directly against the United States. *Northern Pacific Railroad Company* v. *North Dakota, supra*, at 152.

Petitioner's cases limiting state court jurisdiction distinguished.

The cases cited by petitioner wherein the jurisdiction of the state court was successfully challenged are clearly distinguishable and their principle should not be extended hereto. They comprise the following groups:

The *habeas corpus* cases. These are *Ableman* v. *Booth*, 21 How. 506, and *Tarble's* case, 13 Wall 397. In each of these cases the denial of State court power was predicated upon the impotence of the Federal Government to enforce its criminal code if every arrest by a Federal of-

ficer was subject to nullification by habeas corpus of a hostile sovereign. "If the judicial power exercised in this instance has been reserved to the States, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the petitioner happens to be imprisoned". *Ableman* v. *Booth, supra,* at 514, the *Tarble's* case, *supra,* at 403. The extensive reference by the court to the chaotic conditions that would result if its criminal process were subject to interference by State courts throughout the nation justifies our characterization of these cases as being *sui generis.*

In the *Ableman* case the petitioner had been found guilty in a Federal District Court for violating the Federal fugitive slave law, after which conviction the State court had released him for its unconstitutionality. *Ibid,* p. 510. In the *Tarble's* case the prisoner was awaiting trial for desertion from the army but claimed he had been illegally mustered in because parental consent had not been secured to his enlistment as a minor. (*Tarble's* case, at 399).

Petitioner claims that Tarble's case (although admittedly criminal) has anticipated the fact that the injunction will not restrain a Federal officer since it will be issued only if he lacks authority. But a significant fact in Tarble's case was that the alleged jurisdictional fact (lack of parental consent when the minor was mustered into the army) did not prevent the minor from becoming a soldier and subject to the military law upon desertion, for which charge he was being held by the military authorities. The determination of the jurisdictional fact in his favor would not necessarily have released him from trial for desertion.

The principle of *Tarble's* case seems to be definitely limited by the converse situation in *Drury* v. *Lewis*, 200 U. S. 1, wherein the discharge of a writ of *habeas corpus* by a federal court was affirmed by this Court where an army officer had been indicted in a state court for murder arising out of his attempt to apprehend a person suspected of stealing government property. This Court held that "even though it was petitioners' duty to pursue and arrest Crowley (assuming that he had stolen pieces of copper)," the state court had the power to determine the jurisdictional fact, which, if decided one way, would have exonerated petitioner for an act done in course of federal duty, or decided contra, would have held him for murder. "* * * it was for the state court to pass upon it, and its doing so could not be collaterally attacked."

The mandamus cases: These cases, such as *McClung* v. *Silliman*, 6 Wheat. 598, are also distinguishable. We are not in accord with petitioner's explanation that writs of mandamus and injunction differ only in form (Pet. Br. 37). The premise of a writ of mandamus is that the defendant is a federal officer and not only has the power but that it is his duty to perform the act in question; the premise of a writ of injunction, as in this case, is that the defendant lacks any power as a federal officer. The issuance of a writ of mandamus out of a state court directed to a federal officer would result, if obeyed, in the performance of the functions of the Federal Government by decree of state courts rather than by federal law and regulation.

The tax case: This is *Keely* v. *Sanders*, 99 U. S. 441; Pet. Br. 37. We agree with petitioner that "this case may be distinguished upon the traditional reluctance to re-

strain the collection of federal taxes" (Pet. Br. 37). And although "its statement is cast in terms of a principle of general application," (*ibid*) such statement it is respectfully submitted is obiter since the injunction of the state court was not violated for the "sale did not disturb any possession which the state court had of the property," (99 U. S. at 442), and proof was both sparse and incompetent that the property sold for federal taxes ever was under the jurisdiction of that court. (*ibid.*)

We submit that if the question of the power of a state court to restrain a federal officer acting without legislative authority be novel in this Court, that the reasoning of *Teal* v. *Felton, supra, Slocum* v. *Mayberry, supra,* and *Northern Pacific Railway Co.* v. *North Dakota, supra,* be extended and applied to the present question. The *Northern Pacific* case may indeed be controlling. The habeas corpus, mandamus, and tax cases are *sui generis* and should not be extended.

Congressional action in raising the value of the matter in controversy necessary for jurisdiction in the Federal District Courts, even though a federal question be involved (Jud. Code, Sect. 24; 28 U. S. C. 41 [1]), from 500 to 2000 and then to 3000 dollars (1 Stat. 73; 24 Stat. 552; 25 Stat. 433; 36 Stat. 1091) exhibits its intention not to curtail jurisdiction of state courts in matters wherein they have concurrent jurisdiction with the Federal District Courts. A ruling denying the state court jurisdiction in this case would mean that *no* injunction suit could ever be filed in a State court against a Federal employee however patent his lack of authority. Since the defect of the State court jurisdiction would be constitutional, we do not comprehend the significance of petitioner's comment (Pet. Br.

42) that the remedy for such evil lies with Congress, unless the inference is that Congress should eliminate the jurisdictional amount. The harshness of such a rule would leave a litigant without remedy in both State and Federal court if the matter in controversy for which protection was sought amounted to less than $3000. If Congress should further enlarge the jurisdictional minimum, the class without remedy would be increased.

II.

THE SECRETARY OF THE INTERIOR LACKED AUTHORITY UNDER THE TAYLOR GRAZING ACT TO ADOPT THE REGULATIONS OF MARCH 2, 1936 IN THE RESPECTS COMPLAINED OF, AND CONGRESS HAS NOT SUBSEQUENTLY RATIFIED THE UNAUTHORIZED ASSERTION OF AUTHORITY.

Petitioner does not dispute that the regulations of March 2, 1936 do not fulfill the conditions established by Congress in Section 3 of the Taylor Grazing Act which the respondents contend must be conformed with any licensing system set up under that Act.[1] Petitioner does not and has never attemped to square these regulations or the temporary revocable licenses thereunder with the requirements of Section 3 of that Act which respondents allege have been wholly disregarded. These respects are:

(1) The temporary licenses expressly state that they are temporary and revocable without any qualifications or restrictions upon such right of revocation, whereas

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[1] The Act (June 28, 1934, c. 865, 48 Stat. 1269; 43 U. S. C. 315) is printed at R. 15-23. Pertinent provisions of the "Rules for Administration of Grazing Districts" (herein referred to as the Rules of March 2, 1936) are found at R. 23-27.

Section 3 provides that permits "shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior * * *" (See Complaint, par. 14(e), R. 9, 10).

(2) The grazing fees provided for by the Rules of March 2, 1936 are uniform throughout the entire area subject to the Act, whereas Section 3 provides that "the Secretary of the Interior is hereby authorized to issue * * * permits * * * upon the payment annually of reasonable fees in each case to be fixed or determined from time to time" (See Complaint, par. 14(d) R. 8, 9).

(3) Since the licenses are temporary and revocable, licensees are denied the benefit of those provisions of Section 3 which provides that:

(a) "No permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan."[2] (See Complaint, par. 14(f), R. 10.)

(b) "That nothing in this Act shall be * * * administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law." (See Complaint, par. 14(g), R. 10.)

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[2] This provision is sometimes referred to as the McCarran amendment.

A. The Supreme Court of Nevada correctly held that any permit or license system for grazing under the Taylor Act must conform with the limitations of Section 3 thereof.

The Supreme Court of Nevada decided that "nothing has been presented in this case which would justify us in going further and holding that, regardless of and contrary to the provisions of Section 3, the fees could legally be based upon the uniform rate prescribed by the Rules of March 2, 1936, or that any part of said Rules can be held valid if inconsistent with that Section or any other provisions of the Grazing Act" (R. 57). Respondents submit that this interpretation is correct.

1. *The Legislative History of the Act Establishes a Legislative Intent that any Licensing System must Conform with the Requirements of Section 3.*

We do not dispute that if the Taylor Act contained only Section 2 and omitted Section 3, the Secretary of the Interior would have had authority thereunder to establish a licensing system similar to that set up by the Department of Agriculture for forest lands under the Forest Reserve Act of 1897 (Sec. 1, 30 Stat. 35, 16 U. S. C. Sec. 551). *United States* v. *Grimaud*, 220 U. S. 506. Section 2 of the Taylor Act has some similarity in language and structure with Section 1 of the Forest Reserve Act.

The significant and controlling feature of the Taylor Act as to licensing is the enactment of Section 3 containing a complete pattern for any licensing system to be instituted under the Act. We do not know whether Congress intended that licensing power should issue solely from Section 3. The reports of the Public Lands Committees

of both Houses at the time of its enactment appear to have so construed it.[1] It is noteworthy that petitioner makes no reference to any legislative proceeding whatsoever which states expressly that any licensing power issues under Section 2. But we do know and assert that it was the intention of Congress, manifestly expressed, that any licensing power when exercised must conform with the requirements of Section 3.

The Taylor bill is the culmination of agitation and abortive legislation for over forty years to provide for the orderly use, improvement and development of the public range which had not been otherwise appropriated.[2] Predecessor bills merely gave the Secretary of the Interior a general power to make regulations similar to that exercised by the Secretary of Agriculture in his domain.[3] Such bills failed because, as stated by Representative Taylor, "*many people are not willing to give just carte blanche provisions of that kind in the bill. They, with some justification, feel that there are some things that they should*

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[1] See H. Rep. 903, 73rd Cong., 2nd Sess., pp. 2, 3, 7; S. Rep. 1528, *ibid.*, pp. 2, 3, 5. The Senate report, in summarizing the bill states that "the specific purposes of the bill are enumerated in its title *and repeated in Section 2*, and are as follows: * * *" Then, summarizing each of the subsequent sections of the bill, the report states, obviously referring to Section 3, that "it comprehends the issuance of permits to graze livestock on such grazing districts to bona fide settlers, residents and other stockholders * * *" (at 2, 3).

Intrinsic evidence of such intention, in addition to the comprehensiveness of the provisions of Section 3, is its provision that "the Secretary of the Interior is *hereby* authorized to issue * * * permits".

[2] S. Rep. 1258, 73 Cong., 2nd Sess., p. 2. *Omacchevarria* v. *Idaho*, 246 U. S. 343, 346.

[3] An example is H. R. 4541, 72nd Cong., 1st Sess.

specifically provide for or reserve in the law itself for their guaranty."[4]

The first predecessor bill which follows the formula of the Taylor Act in limiting the Secretary's authority as to licensing was introduced by Representative French.[5] Its Section 3 appears to be the embryo of Section 3 of the Taylor Act. The French bill was supplanted by the Colton bill in the same session.[6] The latter, having been reintroduced in the succeeding Congress, finally became the Taylor Act.[7] Representative Taylor has testified that his bill is "a composite outgrowth of many years' consideration by former Congressman Colton of Utah; French

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[4] 78 Cong. Rec., Pt. V, p. 5372; hearings, H. Com. on Public Lands on H. R. 2835, 73rd Cong., 1st Sess. and H. R. 6462, 73rd Cong., 2nd Sess., p. 74; Opinion below, R. 54.

Mr. Taylor's remarks in full are as follows: "Returning to the bill before us I may say this bill originally started with about a dozen lines, just putting all this public domain under the jurisdiction of the Interior Department, to be administered for the general welfare of the Government and for the public good. But we have been adding to it all the time until now the bill contains 10 pages, consisting quite largely of just unnecessary regulations written into the bill. The Secretary could do practically everything that is provided for in the bill if we had simply turned it over to him. Nearly all these things could be provided for by regulations. However, many people are not willing to just give carte blanche provisions of that kind in the bill. They, with some justification, feel that there are some things that they should specifically provide for or reserve in the law itself for their guaranty.* * *"

[5] H. R. 8822, 72nd Cong., 1st Sess.

[6] H. R. 11816, 72nd Cong., 1st Sess. Sections 2 and 3 of the Colton bill were similar in form and substance to the Taylor Act.

[7] H. R. 2835, 73rd Cong., 1st Sess., and H. R. 6462, 2nd Sess. The latter eliminated Section 13 of the former. The House Committee on Public Lands held simultaneous hearings on both bills and favorably reported on H. R. 6462 with amendments. H. Rep. 903, 73rd Cong., 2nd Sess., pp. 1, 5.

of Idaho, Sinnott of Oregon; Evans and Leavitt of Montana; myself and several other western congressmen."[8]

Between the introduction of the Taylor bill in the 73rd congress and its enactment, further limitations were written into Section 3 as to any licensing system to be established,[9] "largely to insure the more complete protection of those now enjoying the use of the public land."[10]

The legislative history of the Act discloses also the particular purposes sought to be achieved by the provisions and amendments to Section 3 which respondents are now seeking to preserve.

An object of the bill, stated in its preamble, is "to stabilize the livestock industry dependent on the public range." Section 3 was designed to accomplish this in part by providing qualified stockmen with some certainty of tenure. Mr. Taylor, who envisaged that the administration of his act under the Department of the Interior would

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[8] Hearings, H. Com. on Public Lands on H. R. 2835 and 6462, 73rd Cong., 2nd Sess., p. 68.

[9] These amendments in substance provided: (1) for preference in issuance of grazing permits to designated groups, (2) that a renewal of a permit shall not be denied a permit holder if the denial will impair the value of the grazing unit of the permittee when the unit is pledged as security for a bona fide loan (the McCarran Amendment), (3) that the Act shall not be construed or administered to impair any water rights which have vested or accrued under existing law; (4) grazing privileges recognized and acknowledged shall be adequately safeguarded, but the issuance of permits shall not create any right, title or interest in and to the public lands. (See Hearing, *ibid.*, p. 195; S. Rep. 1258, 73rd Cong., 2nd Sess. p. 9).

Other limitations in the bill as introduced were preserved, namely: (1) that the permits be for a period of years, not more than ten; (2) that the permits may be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time".

[10] S. Rep. 1258, *ibid.*, p. 9.

parallel the administration of the Department of Agriculture under the Forest Reserve Act, testified:[11]

> "It tends to stabilize the stock raising industry. At the present time, there is no such thing as a stabilized industry on the range. A man does not know whether he can graze his stock anywhere on the range next year, or not. There is no allotment to him of a specific piece of ground that he may graze his stock upon, and that is very necessary for the development and stabilization of the livestock industry * * *. They (the Department of Agriculture) give ten-year permits. They do give them permits, and they know in advance that they will get the permit. They know in advance where they must keep their stock * * *."[12]

Contrary to such intention, Director of Grazing Carpenter has testified, subsequent to the adoption of the rules in question, that a temporary license is "subject to cancellation almost at any moment and (is) not a valuable asset in a stabilized business * * *."[13]

The clause in Section 3 which requires the payment annually "of reasonable fees, in each case to be fixed or determined from time to time," was designed so that

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[11] Hearings, *ibid.*, pp. 26, 30.

[12] In recommending passage of the Taylor Act, Secretary of the Interior Ickes wrote the House Committee on Public Lands that "* * * those engaged in the livestock industry have no certainty of tenure in their grazing use of the public lands. This situation seems now to be thoroughly realized both by local organizations and individuals interested in the livestock industry and by Congress" (H. Rep. 903, 73rd Cong., 2nd Sess. p. 7); for similar opinions of Secretary of Agriculture Wallace and Secretary of the Interior Wilbur, see H. Rep. 903, 73rd Cong., 2nd Sess., p. 11; H. Rep. 1719, 72nd Cong., 1st Sess., p. 5.

[13] Hearings, Sub-Committee of House Committee on Appropriations, H. R. 10630, 74th Cong., 2nd Sess., 1936, p. 14.

licensed stockmen would pay fees that are to some degree at least commensurate with the value of the forage.

Mr. Colton's bill[14] had provided for the payment annually "of reasonable fees to be fixed or determined from time to time under his authority." Chief Forester Stuart, who had helped draft that bill, testified on the great difference in grazing value of lands subject to it and, after commenting on the economics of the livestock industry, concluded that "this illustrates the need of complete coordination of fees based upon the actual value to the permittees * * *."[15] When the bill was favorably reported, the provision as to fees was amended by inserting the words "in each case," further to insure that the fees to be paid would be commensurate with the value of the forage.[16] Such also is the language of the Taylor Act.[17]

During the hearings on the Taylor Act, the Department of the Interior introduced evidence, based on surveys of the Geological Service, as to the acreage by states of vacant, unappropriated land, and its annual lease value for grazing purposes.[18] 29% of the total vacant unreserved public land is located in Nevada. Of over 50 million acres of public domain in Nevada, over 35 million acres (or about 70% of it) are less-than 1-cent

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[14] H. R. 11816, 72nd Cong., 1st Sess.

[15] Hearing, H. Com. on Public Lands, H. R. 11816, 72nd Cong., 1st Sess., p. 6.

[16] *Ibid.*, p. 151.

[17] The uniform fee basis "cannot be reconciled with the idea of 'reasonable fees in each case to be fixed or determined from time to time'". Opinion below, R. 56; *United States* v. *Achabal*, 34 F. Supp. 1.

[18] See table and map, Hearings, Sen. Com. on Public Lands, 73rd Cong., 2 Sess., H. R. 6462, pp. 49, 50; Hearings, House Comm. on Public Lands, *ibid.*, pp. 85-87; see complaint pars. 6, 10, 14(d), R. 4, 6, 8.

land,[19] i. e. the use value of which for grazing purposes is less than 1-cent an acre per year. 15 million acres are 1 to 2 cent land. *It has no 2 to 3 cent land.* Of Montana's 6 million acres of public domain, over half is 2 to 3 cent land, *and it has no less than 1-cent land.* Of New Mexico's 13 million acres, about a fifth is 2 to 3 cent land. Of Oregon's 13 million acres, 10 million acres are 1 to 2 cent land, over a million less-than 1-cent land, and over a half million acres 2 to 3 cent. Three-fifths of Utah's 25 million acres of public domain is less-than 1-cent land. Further comparison is unnecessary to show the disparity in grazing value of the lands subject to the Act.

Two courts in the course of this litigation have recognized judicially this disparity. In *United States v. Achabal* (wherein collection of grazing fees is being sought against the respondents herein despite the pendency of this suit) Judge Norcross considered this situation as one of common knowledge, saying:

> "The determination of a 'reasonable fee in each case' is clearly a matter which may not be covered by any general rule. Grazing areas vary materially in value. Twice the area in one section may be required to supply the same number of cattle or sheep

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[19] The less-than-one cent land was estimated by the Geological Service to carry less than an average of eight animal units, and the one-to-two cent land between eight to fifteen animal units per square mile. Both categories are classified as "too poor" for stock raising. The two-to-three cent land was estimated to carry an average of more than fifteen animal units per square mile, and is classified in "too poor in part" for stockraising classification. (Hearings, Sen. Com. on Public Lands on H. R. 6462, 73rd Cong., 2nd Sess., p. 50.)

The grazing fees under the Rules of March 2, 1936, are on a different rental or fee basis. They are on a per head per month basis, regardless of acreage.

than in another section some distance therefrom. The larger area required for a given number of grazing stock may also affect the cost of herding and because of a larger area to be covered by the ranging stock may occasion some material difference in animal weight at the close of the grazing season. Manifestly it was for reasons of this character that the statute provided for a determination of a 'reasonable fee in each case.'" (*United States* v. *Achabal*, 34 F. Supp. 1, 3 [D. C. Nev.].)

The Supreme Court of Nevada wrote:

"The idea of fees determined on the basis of uniform rates for live stock grazing on the millions of acres of public range land scattered throughout eleven western states, without taking into consideration the different conditions to be found in various portions of this vast domain, cannot be reconciled with the idea of 'reasonable fees in each case to be fixed or determined from time to time.' It is a matter of common knowledge among the stock men of the far western states that the best rates on grazing fees in the national forest are not the same in every national forest, either for cattle or sheep" (R. 56).[20]

[20] Petitioner's statement (Pet. Br. 50) that "the temporary rates, (5c per month for each head of cattle and 1c per sheep) are regarded by the Department of the Interior as far below the actual value of the public range, and hence certain not to be unreasonable, in any particular case", is not germane to the issue and is completely *dehors* the record. Had petitioner answered the complaint, quaere whether such ex parte opinion would have been admissible even as evidence.

Petitioner elected to stand on his demurrer and the decree recites that "each and all of the allegations of the complaint of plaintiffs are taken as confessed and true" (R. 34, 56). The complaint contains such allegations of fact as to the economics of the respondents' livestock business in Nevada Grazing District No. 1 as to establish the inapplicability of the uniform fee as to them (Pet. Par. 6, 10, 14(d), 17(c); R. 4, 6-9, 12).

The legislative history of the Act thus shows a Congressional intent that the conditions of Section 3 must be conformed with in any licensing system, and that those conditions which respondents assert have been ignored secured particular Congressional emphasis.

2. *The Subsequent Unsuccessful Attempt by the Department of Interior to have Repealed a Provision in Section 3 Confirms the Original Legislative Intent.*

In the session of Congress following the enactment of the Taylor Act, but a year before the promulgation of the Rules of March 2, 1936, the Department of the Interior unsuccessfully attempted to have repealed that portion of Section 3 which provides that permits are to be renewed if a denial of renewal will impair the value of the grazing unit when such unit is pledged as security for a bona fide loan (the McCarran Amendment). This provision is now the principal target of petitioner's attack as making inflexible the administration of the Act under Section 3 (Pet. Br. 45).

But when the Secretary of the Interior forwarded his request for repeal, he did not *then* represent to Congress that he was finding administration of the Act pursuant to Section 3 impractical, but he represented that "this provision, as applied to grazing permittees is discriminatory and highly unfair as it, in effect, rewards permittees who continue liens on their grazing units and penalizes those who discharge their obligations."[21]

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[21] House Rep. 479 to accompany H. R. 3019, 74th Cong., 1st Sess., p. 4.

In the most conclusive manner, the repeal amendment was defeated.[22] Such action establishes with finality a Congressional intention that the limitations of Section 3 must not be disturbed. Unsuccessful with repeal, the Department evidently decided to ignore it.

3. *Respondents' Interpretation of the Relation Between Sections 2 and 3 of the Act Follows the Precedent of This Court.*

Respondents submit that the provisions of the Taylor Act in question are so clear and their meaning so plain that no difficulty attends their construction. Adherence to the terms of Section 3 does not lead to an impossible or an unreasonable result. (*Infra*, p. 56.) We are bound by the enactment as the final expression of the meaning intended. (*U. S. v. Mo. Pac. R. R. Co.*, 278 U. S. 269, 277, 278 [1928]).

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[22] The House Committee on Public Lands recommended the elimination of the repeal provision. (H. R. 479 to accompany H. R. 3019, 74th Cong., 1st Sess. pp. 2, 3). The House, after debate, reinserted it. (Cong. Rec. Vol. 79, Pt. 7, 74th Cong., 1st Sess., pp. 8104-8107.) The Senate Committee on Public Lands struck out the repeal provision and reported that "after hearing testimony upon the subject, concluded that it would be advantageous to permit this section to remain, and, consequently, disagreed with the House in this particular". (Sen. Rep. 1105 to accompany H. R. 3019, 74th Cong., 1st Sess., p. 3.) In conference, the House receded so that, as passed, Section 3 of the Taylor Act was not disturbed. (Cong. Rec., Vol. 79, Pt. 13, 74th Cong., 1st Sess., p. 14013.)

The spokesman for the Department of the Interior stated that "that provision (sought to be repealed) has been the subject of more contention that any provision in the act * * * I will state this for the record: I personally see no objection to the language of this provision which was deleted. I have never held the fears for it that many other people have * * *." (Hearings, Sen. Comm. on Public Lands, S. 2539, 74th Cong., 1st Sess., pp. 79, 80.)

The Secretary of the Interior has acted as if the act did not contain Section 3, but significance must be given it in its entirety. (*Ex parte Public Bank*, 278 U. S. 101, 104). This Court has often announced that where an act contains both general and specific provisions relating to a particular subject, it is a rule of construction that follows the dictates of common sense that Congress intended that the more particular provisions expressed its intention, even though the general provisions standing alone might be broad enough to include the subject to which the more particular provision relates. *Townsend* v. *Little*, 109 U. S. 504, 512; *United States* v. *Nix*, 189 U. S. 199; *Kepper* v. *United States*, 195 U. S. 100, 125; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487; *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42; *Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208; *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269. The legislative history of Sections 2 and 3 confirm the practicality of this rule of construction and warrants its application in the premises.

4. *Petitioner's Defense of the Regulations Answered.*

Petitioner defends the assertion of power under Section 2 on three grounds: that the language of Section 2 is allegedly mandatory, whereas the language of Section 3 is allegedly permissive (Pet. Br. 47, 48); a plea of necessity that obedience to the provisions of Section 3 would make difficult the administration of the Act in its infancy (Pet. Br. 44-47); that an administrative construction which is within the language of the statute should not lightly be disturbed by the courts (Pet. Br. 51).

Petitioner's first argument fails to notice that the language of Section 3 is in terms as imperative as the language of Section 2. Section 3 does not order the Secretary of the Interior to institute a licensing system. It authorizes him to do so but requires that when he so acts, he *shall* abide by the provisos therein. Each of the limitations and provisos in Section 3 is in such imperative language.[23]

Nor would the so-called "mandatory" provisions of Section 2 ever be in effect unless the Secretary should first elect to establish grazing districts under the provisions of Section 1, "authorizing" him "in his discretion" to do so. Thus, Section 2 is no more mandatory than Section 3.

As to petitioner's plea of impracticality in instituting a licensing system conformable with the requirements of Section 3, respondents' only answer is, if such plea is well founded in fact, that "inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation." (*U. S.* v. *Mo. Pac. R. R. Co.*, 278 U. S 269, 277) The Department's efforts to repeal a provision of Section 3 are in this connection entitled to great significance (*Supra*, p. 52).

Although they criticized the Taylor Act in course of enactment in other respects, neither the Secretary of the Interior nor the Secretary of Agriculture, the latter with extensive experience of his Department under the Forest Reserve Act, criticized any prospective inflexibility under

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[23] When the Taylor Act was in process of enactment the Department of the Interior, in summarizing the bill, did not distinguish between types of authority conferred by Sections 2 and 3. Although not so expressly stated, the Department appears to have considered Section 2 as a general enabling clause and that Section 3 dealt with the subject of licensing. See H. R. 903 to accompany H. R. 6462, 73rd Cong., 2nd Sess. p. 7; Sen. R. 1182, *ibid.* p. 5.

Section 3;[25] nor, so far as respondents can ascertain, was any amendment ever suggested in the extensive hearings on the Taylor Act and its predecessor bills such as respondents now seek to make by judicial construction.

In Section 3 Congress has provided wide flexibility and discretion in the Secretary of the Interior to meet the practical difficulties that could be expected to arise in the administration of the Act. Section 3 does not order the Secretary of the Interior to institute a licensing system. Permits were to be issued to such as "under his rules and regulations" are entitled to participate in the use of the range. Unless the permittee has pledged his ranch for a bona fide loan, permits are to be renewed "in the discretion of the Secretary of the Interior." The Secretary is to "*specify from time to time numbers of stock and seasons of use.*"[26] Thus in vital matters affecting the use and protection of the public range the Secretary appears to have sufficient latitude under Section 3 to have instituted a licensing system conformable with its provisions, and flexible as to experience and the hazards of nature.

After approximately seven years of administration, it seems strange that the Department should have insufficient data to establish a licensing system conformable with the flexible requirements of Section 3. The General Land Office and the Geological Service have been operating for many years. Respondents have not compiled a bibliography of surveys and studies as to public range but notice that the public domain in Nevada has been recently and

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[25] See House Rep. 903 to accompany H. R. 6462, 73rd Cong., 2nd Sess., pp. 7-11; Senate Rep. 1182, *ibid*, pp. 4-9.

[26] Applying, as this does, to term permits, it affords complete control and flexibility, when properly applied.

comprehensively mapped out and analyzed by the Department of Agriculture[27] and the State of Nevada is constantly engaged in such work.[28]

Promises to institute a licensing system in the indefinite future conformable with Section 3 cannot be substituted for rights assured by Congress which administrative officials are charged with preserving. Meanwhile the stabilization of the livestock industry dependent on the range —one of the express purposes of the Taylor Grazing Act (R. 15)—is not being accomplished.

An administrative interpretation of an act is entitled to serious consideration by a court when it has become long established and when it relates to an ambiguous statute, that is, when either of two interpretations will be entirely consistent with its provisions.[29] Neither condition

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[27] "The Public Domain of Nevada and Factors Affecting Its Use", Dept. of Agriculture, Technical Bulletin #301, April, 1932. See particularly its bibliography.

[28] See, for example, biennial reports of the State Engineer of Nevada; publications of the Agricultural Experimental Station, University of Nevada, such as Bulletin #133, September, 1933, "The Main Reasons Why Range Cattle Ranches Succeed or Fail" (an economic analysis of ranching in Nevada); Bulletin #139, March, 1935, "The Public Range and the Livestock Industry of Nevada".

[29] *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 280 (1928); *Iselin* v. *United States*, 270 U. S. 245, 251 (1926); *Louisville and Nashville R. R. Co.* v. *United States*, 282 U. S. 740, 775 (1931).

This Court has said:

> "* * * It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See e. g. *Logan* v. *Davis*, 233 U. S. 613, 627. But the court is not bound by a construction so established. *Chicago Etc. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99. *United*

is herein fulfilled and an administrative interpretation can never be employed to override the express provisions of a statute or to create authority where there is none.

The Department of the Interior has vested itself with additional statutory power merely by exercising such power. This Court has observed that "the only power conferred, or which could be conferred, by the statute is to make regulations to carry out the purpose of the Act—not to amend it." (*Miller* v. *United States*, 294 U. S. 435, 440).

B. Congress has not ratified the unauthorized regulations.

1. *The "Appropriation" Acts cannot be so construed.*

Petitioner first claims that "the appropriation of money for range improvements on the basis of fees collected in the several grazing districts (25% of the estimated $1,000,000 revenue to be derived from temporary licenses) constitutes a ratification of the temporary license and fee system inaugurated by the Department pursuant to Section 2 of the Act (Pet. Br. 53). This was not a general appropriation for the enforcement or administration of the licensing system. Congress was under its own statutory duty under Section 10 of the Taylor Act to make

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States v. *Dickson*, 15 Pet. 141, 161. The rule does not apply in cases where the construction is not doubtful. And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U. S. 568, 571. *Merritt* v. *Cameron*, 137 U. S. 542, 551-552. *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621. *United States* v. *Healey*, 160 U. S. 136, 145. *Studebaker* v. *Perry*, 184 U. S. 258, 268. *Houghton* v. *Payne*, 194 U. S. 88, 99." (*United States* v. *Mo. Pac. R. Co.*, *supra*, at 280).

the appropriation, so that its action implies no voluntary, affirmative recognition of the illegality, even if adequate disclosure had been made to Congress.

Section 10 of the Taylor Act provides that—

> "* * * all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received from each grazing district during any fiscal year is hereby made available, when appropriated by the Congress, for expenditures by the Secretary of the Interior for the construction, purchase or maintenance of range improvements * * *."

The Appropriation Act of June 22, 1936 (c. 691, 49 Stat. 1757, 1758), which is typical of those subsequent[1] carries out the directions in Section 10. It provides:

> "For construction, purchase and maintenance of range improvements within grazing districts pursuant to the provisions of Sections 10 and 11 of the Act of June 28, 1934 (48 Stat. p. 1269), and not including contributions under Section 9 of said Act, $250,000: *Provided*, That expenditures hereunder in any grazing district shall not exceed 25 per centum of all moneys received under the provisions of said Act from such district during the fiscal years 1936 and 1937."

The action of Congress in fulfilling its obligation to appropriate can be construed only as an intention to fulfill that duty.

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[1] The four subsequent acts are substantially the same as the Act of 1936. They are: Act of August 9, 1937, c. 570, 50 Stat. 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub. No. 640, 76th Cong. 3rd. Sess.

The fictitious basis for the alleged ratification is revealed by the debates in Congress on the appropriation bill in 1936. (See Pet. Br. 53, notes 67, 68). They show neither discussion nor knowledge that the funds were to come from temporary licenses under Section 2 rather than term permits conformable with Section 3. In fact, the rules of March 2, 1936 were not promulgated for more than a month after the House acted on the "appropriation."[2] The Senate was similarly ignorant of the nature of the regulations which it is alleged to have "ratified."[3]

None of the six cases cited by petitioner is precedent in the premises. In four of them Congress, in subsequent legislation, *specifically referred to and identified* the order or regulation in dispute and took action which *affirmatively indicated its legality*. In the remaining two, the Court found that the assertion of authority was valid when exercised, and the facts as to ratification are too inapposite to be helpful.

Thus, in *Hamilton* v. *Dillin*, 21 Wall. 73 (1874), Pet. Br. 55, Congress ordered that all moneys collected "under the rules and regulations * * * dated, respectively, the 28th of August, 1862, 31st of March and 11th of Septem-

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[2] 80 Cong. Rec. Pt. II, p. 1274, 1936.

[3] Senator Hayden, the member of the Appropriations Committee who was in charge of the bill, was asked as to "the amount, if any, which will be received from stockmen who obtain *permits*". He replied:

> "Mr. President, the only information I have on that subject is that about 6 weeks ago a conference was held in the Senator's home city of Salt Lake between representative stockmen from the entire West and officials of the Division of Grazing Control to determine just exactly what the rates should be. Whether or not such rates have been promulgated, and how much money they will produce, I do not know." (80 Cong. Rec. Pt. III, p. 3026 [1936].)

ber, 1863 * * * be turned over to the Treasury." The Supreme Court said:

> "Here the regulations in question are referred to by name and date, and the money accruing under their operation (the great bulk of which was derived from the bonus on cotton) was directed to be paid into the Treasury * * *. This was clearly an implied recognition and ratification of the regulations, so far as any ratification on the part of Congress may have been necessary to their validity" (pp. 96-97).[4]

Where after years of debate Congress finally passed the Taylor Grazing Act including the restrictions of Section 3, it is artificial to charge that it ratified and ap-

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[4] The other three cases cited by petitioner wherein Congress subsequently made express reference to the rule in dispute are:

Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139. (Subsequent specific reference to "President's executive order #6166".)

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 (same).

Duke Power Co. v. *Greenwood County*, 91 F. (2d) 665 (C. C. A. 4th, 1937), affd. 302 U. S. 484. (Subsequent appropriation for a list of Federal construction projects which contained the one in dispute.)

The other two cases cited by petitioner are *Street* v. *United States*, 133 U. S. 299, and *Wells* v. *Nickels*, 104 U. S. 444.

The *Street* case involved the legality of the President's mustering-out order of January 2, 1871, which Street contended, 17 years after his discharge, was invalid because authority to issue it had expired on January first. The court rejected this contention on four alternative grounds: (1) the discrepancy in dates was a technicality; (2) since January first had been a Sunday the President was entitled to exercise his authority on the next succeeding legal day; (3) the President was justified by other considerations; and (4) several subsequent acts of Congress reinstating to service

proved violations of this section because it appropriated moneys without consideration or debate as to Section 3. Indeed, the adoption of such a rule of ratification would require Congress to add to every appropriation of money to carry out the provisions of some administrative act, a proviso that the appropriation should not be construed as an approval of any act or thing done in violation of or not authorized by such former act.

2. *The Amendments of the Taylor Act by Act of June 26, 1936 Cannot Be So Construed.*

The amendatory act of June 26, 1936[5] related only to Sections 1, 7, 8, 10 and 15 of the Taylor Act.[6] Sections 2 and 3 were neither changed nor reenacted. The regulations of March 2, 1936 had been adopted only three months prior and their enforcement was in a preliminary stage and already the subject of legal attack (R. 1, 28).

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officers who had been mustered out by the order in question assumed the validity of the order.

In *Wells v. Nickels*, where for twenty years timber agents had exercised authority under a departmental letter to compromise timber depredations on the public lands, it was held (a) that the timber agent had authority to make a compromise; and (b) although the office of timber agent was not created by statute, "if any authority from Congress to do this was necessary, it may be fairly inferred from appropriations made to pay for the services of these special timber agents".

[5] Act of June 26, 1936, c. 842, 49 Stat. 1976.

[6] These amendments (1) extended the jurisdiction of the act from eighty to one hundred forty-two million acres; related (2) to the withdrawal of lands that were better suited for agricultural purposes than for forage crops, (3) to the gift of lands to the United States and the exchange of lands and the leasing of lands by the United States not adapted to grazing; and (4) to Section 10 concerning appropriation of moneys received.

The enlargement of the area subject to the Taylor Act cannot be construed as a ratification of the temporary licensing system because (1) Sections 2 and 3 were not the subject of reenactment or amendment; (2) at its prior session Congress had similarly enlarged the area but had refused to amend Section 3, though so requested by the Department of the Interior.[7] It is significant that the Department of the Interior did not seek legislative clarification of its authority as to licensing when the amendatory act was under discussion and its regulations under Section 2 about to be released. The principle of ratification by reenactment relates to a settled construction by an administrative body of a statute which is in fact reenacted.[8]

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[7] H. R. 3019, 74th Cong., 1st Sess.; see note p. *supra*. This bill suffered a pocket veto. (Cong. Rec., 74th Cong., 1st Sess., Vol. 79, Pt. 14, p. 761.)

[8] In the following cases cited by petitioner (Pet. Br. 55, 56) Congress subsequently passed statutes which reenacted or incorporated by reference the particular provision in the previous statute which had received an administrative construction. They are *United States* v. *Alexander*, 12 Wall. 177; *National Lead Company* v. *United States*, 252 U. S. 140; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S. 269, 273. In *Swigart* v. *Baker*, 229 U. S. 187, Congress in two other statutes incorporated the effect of the regulation in dispute.

The following cases cited by petitioner (Pet. Br. 56, note 76), illustrate that the weight to be given any administrative ruling is dependent upon the number of years in which it has been in effect. In *Alaska Steamship Co.* v. *United States*, 290 U. S. 256 (1933), Congress had appropriated money over a period of 35 years for the enforcement of the particular administrative practice in question (see pp. 261-261); in *Constanzo* v. *Tillinghast*, 287 U. S. 341 (1932), the Court pointed out that the pertinent rules of the Bureau of Immigration had been in force since 1917; in *Corning Glass Works* v. *Robertson*, 65 F. (2d) 476 (App. D. C. 1931), cert. den. 290 U. S. 645, the interpretation of the Commissioner of Patents had been followed for 27 years and enlarged rather than contracted remedies available to citizens.

3. *The Civil Relief Act of October 17, 1940 Cannot be So Construed.*

The Civil Relief Act is by its title remedial. In a field where priority and continuity of use is paramount, it would be inconceivable that Congress would penalize those entering military service by depriving them of the benefit of priority and continuity, regardless of its attitude as to the legality of the regulations.

III.

CONCLUSION

Wherefore, it appears that the Supreme Court of Nevada did not err and that its judgment should be affirmed.

April, 1941.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 718.—October Term, 1940.

L. R. Brooks, Petitioner,
vs.
Archie Dewar, et al.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

[May 26, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondents brought suit in a Nevada District Court to enjoin the petitioner from barring, or threatening to bar, them from grazing their livestock within Nevada Grazing District No. 1 in default of the payment of certain grazing fees and in default of their holding a license permitting such use of the public lands by them. The bill alleged that the respondents were, and for years had been, in the business of breeding, raising, grazing, and selling livestock within Nevada and within the district; that it was impossible for them to own or lease all the land needed for their business and they owned or leased a small portion of the required land and used vacant unappropriated and unreserved public lands of the United States to satisfy the remainder of their grazing requirements; that their financial and business necessities made it impossible to continue to operate if their ability to graze their livestock on the public range were seriously impaired or interfered with. They averred that, until May 31, 1935, they had been impliedly licensed by the United States to graze livestock on portions of the public range in Nevada.[1] They recited the passage by Congress of an Act of June 28, 1934,[2] and alleged that, on April 8, 1935, the Secretary of the Interior, in accordance with the provisions of the Act, established a grazing district known as Nevada Grazing District No. 1, which included portions of the public range upon which the respondents had theretofore grazed their livestock and that, on May 31, 1935, the Director of Grazing, with the approval of the Secretary, had promulgated rules which re-

[1] See Buford v. Houtz, 133 U. S. 320; Omaechevarria v. Idaho, 246 U. S. 343.

[2] c. 865, 48 Stat. 1269, as amended by Act of June 26, 1936, c. 842, 49 Stat. 1976, 43 U. S. C. Supp. V, § 315 *et seq.*

quired all persons grazing within the district to obtain temporary licenses so to do, for which no fees were to be paid; that, pursuant to the rules, the respondents obtained temporary licenses; that, on March 2, 1936, after an investigation by the Secretary, the Director of Grazing, with the approval of his superior, purporting to act under the authority of § 2 of the Act of June 28, 1934, promulgated rules for the administration of grazing districts, which provided for the issue of temporary licenses to expire on a date named in 1937 or upon the issue of permits provided for by § 3 of the Act, for which licenses graziers were to pay a fee of five cents per month for each head of cattle and a fee of one cent per month for each head of sheep for the privilege of grazing; that the rules further provided that, after issue of the temporary licenses, no stockman should graze livestock upon, nor drive them across, the public range within a grazing district without a license. The complaint recited that, about May 1, 1936, the respondents were notified by the Register of the District Land Office that licenses would be granted them upon payment of the first installment of the grazing fees and that shortly thereafter the defendant, Brooks, who was acting as Regional Grazier of the United States, notified the respondents that unless they paid the installments and obtained licenses by June 15th they would be considered in trespass under the terms of the Act of 1934 and would be punished by fine as provided in the Act. The respondents alleged with particularity the urgent necessity in the conduct of their business that they be permitted to graze their cattle on public lands and that, unless they can do so, they will suffer irreparable and serious damage due to the destruction of their businesses. The bill charges that although the Secretary in promulgating the rules with respect to temporary licenses purported to act under the authority of § 2 of the Act of 1934, that section confers upon him no power so to do and that grazing fees specified by the rules were fixed without any attempt to determine their amounts as required by § 3 of the Act and in violation of conditions prescribed by § 3.

The petitioner demurred and assigned as reasons that the complaint failed to state facts sufficient to constitute a cause of action against him; that there was a defect of parties defendant for failure to join the Secretary of the Interior; that as the United States,

an indispensable party, had not consented to be sued, the court was without jurisdiction; and that the subject matter of the complaint was exclusively within the political power of the United States and not subject to judicial review. The court overruled the demurrer, with leave to answer. The petitioner elected to stand upon his demurrer and the court thereupon entered a decree in favor of the respondents, which the Supreme Court of Nevada affirmed.[3] We granted certiorari because of the importance of the questions involved.

By § 1 of the Act of 1934, the Secretary of the Interior is authorized to establish grazing districts not exceeding in the aggregate an area of 80,000,000 acres out of certain unappropriated and unreserved public lands of the United States[4] if the lands, in his opinion, are chiefly valuable for grazing and raising forage crops. Before any district is created a hearing is to be held after notice at which officials and persons interested are to be heard. Section 2 provides:

"The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; . . . and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

Section 3 authorizes the Secretary to issue permits to graze livestock in grazing districts "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." It commands that preference be given, in the issue of permits, to certain persons described in the section and that no permittee who complies with the rules and regulations of the Secretary shall be denied the renewal of his permit if such denial will impair the value of the permittee's grazing unit when such unit is pledged as

[3] — Nev. —, 106 P. (2d) 755.

[4] Increased to an aggregate of 142,000,000 acres by the amendatory Act of June 26, 1936, *supra*, Note 1.

security for any bona fide loan. The permits are to be for a period of not more than ten years subject to the preferential right of the permittee to renewal in the discretion of the Secretary. There are other provisions for adjustment of the amount of grazing to be permitted under the permits and a corresponding adjustment of the grazing fees in the case of the occurrence of range depletion due to natural causes.

By § 10 it is provided that all moneys received under the authority of the Act are to be deposited in the Treasury of the United States and twenty-five per cent. of such moneys received from any district in a fiscal year is made available, when appropriated by the Congress, for expenditure by the Secretary for range improvements and fifty per cent. of such money received from a district in any fiscal year is to be paid, at the end of the year, by the Secretary of the Treasury, to the state in which the grazing district is situated to be expended by the state for the benefit of the counties in which the district lies.[5]

The petitioner asserts that the judgment below should be reversed because the suit is one against the United States; because the Secretary of the Interior is an indispensable party, and because the State court was without power to enjoin a federal officer. He admits that earlier cases in this court are against his contention but relies on others which he says sustain his view. As this Court remarked nearly sixty years ago respecting questions of this kind, they "have rarely been free from difficulty" and it is not "an easy matter to reconcile all the decisions of the court in this class of cases."[6] The statement applies with equal force at this day. We are not disposed to attempt a critique of the authorities. Since the jurisdiction and the procedure of the court below is sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence where, as here, the bill fails to make a case upon the merits.

The respondents say that, under the Act of 1934, the Secretary is powerless to grant temporary licenses and charge fees therefor; that his sole authority is to issue permanent permits for specified

[5] By § 11 provision is made for disposition of moneys received from districts located on Indian lands. Twenty-five per cent. is made available, when appropriated for expenditure by the Secretary for range improvement.

[6] Cunningham *v.* Macon & Brunswick R. R. Co., 109 U. S. 446, 451.

periods not to exceed ten years, at fees adjusted to the circumstances of individual permittees, and with preferential rights of renewal. If this view be correct it might well be years before the Secretary could place the users of lands in any district under permits. The petitioner asserts that it was not the intent of Congress that the grazing lands should go unregulated and without license for any such extensive period as would be required for the issue of permits under § 3. He relies on the broad powers conferred by § 2 and points out that the section is a replica of the statute involved in *United States* v. *Grimaud*, 220 U. S. 506, and there held to authorize similar rules and regulations.

With knowledge that the Department of the Interior was issuing temporary licenses instead of term permits and that uniform fees were being charged and collected for the issue of temporary licenses, Congress repeatedly appropriated twenty-five per cent. of the money thus coming into the Treasury for expenditure by the Secretary in improvements upon the ranges.[7] The information in the possession of Congress was plentiful and from various sources. It knew from the annual reports of the Secretary of the Interior that a system of temporary licensing was in force.[8] The same information was furnished the Appropriations Committee at its hearings.[9] Not only was it disclosed by the annual report of the Department that no permits were issued in 1936, 1937, and 1938, and that permits were issued in only one district in 1939, but it was also disclosed in the hearings that uniform fees were

[7] Act of June 22, 1936, c. 691, 49 Stat. 1757, 1758; Act of August 9, 1937, c. 570, 50 Stat. 564, 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub. No. 640, 76th Cong., 3d Sess. The form of the Appropriations Act of June 22, 1936, is typical. It is: "For construction, purchase, and maintenance of range improvements within grazing districts, pursuant to the provisions of sections 10 and 11 of the Act of June 28, 1934 (48 Stat., p. 1269), and not including contributions under section 9 of said Act, $250,000: *Provided*, That expenditures hereunder in any grazing district shall not exceed 25 per centum of all moneys received under the provisions of said Act from such district during the fiscal years 1936 and 1937."

[8] Annual Report Secretary of the Interior 1936, pp. 16-17. *Id.*, 1937, pp. xii, 102, 105-107. *Id.*, 1938, pp. xv, 107.

[9] Hearings Subcommittee of House Committee on Appropriations on H. R. 10,630, 74th Cong., 2d Sess., pp. 13-15; Hearings Subcommittee of House Committee on Appropriations on H. R. 6958, 75th Cong., 1st Sess., pp. 80, 83, 89; Hearings Subcommittee of House Committee on Appropriations on H. R. 9621, 75th Cong., 3d Sess., pp. 65, 70, 71; Hearing Subcommittee of Senate Committee on Appropriations on H. R. 9621, 75th Cong., 3d Sess., pp. 3, 28, 29.

being charged and collected for the issue of temporary licenses. And members from the floor informed the Congress that the temporary licensing system was in force and that as much as $1,000,000 had been or would be collected in fees for such licenses.[10] The repeated appropriations of the proceeds of the fees thus covered and to be covered into the Treasury, not only confirms the departmental construction of the statute,[11] but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act.[12]

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[10] 81 Cong. Rec., part 4, pp. 4570-4571; 83 Cong. Rec., part 11, p. 2376; 84 Cong. Rec., part 13, pp. 2931, 2932, 2933.

[11] Wells v. Nickles, 104 U. S. 444, 447.

[12] Isbrandtsen-Moller Co. v. United States, 300 U. S. 139, 147.